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No. 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Petitioner*

v.

UNITED AIR LINES, INC., *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R. 131-138) is reported at 325 F.2d 576. The opinion of the United States District Court for the Southern District of Ohio, Western Division at Cincinnati (R. 127), is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1963 (R. 131). The petition for a writ of certiorari was filed on January 31, 1964, and was granted April 20, 1964. The jurisdiction of this Court rests on Title 28, U. S. Code, Section 1254(1).

QUESTIONS PRESENTED

In the opinion of the petitioner, the following questions are presented:

1. Did the United States District Court have jurisdiction of the subject matter of a complaint by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes against United Air Lines, Inc., which (a) alleged that United, upon the merger of Capital into United, had refused to assume the obligations of a collective bargaining agreement between Capital Airlines and the Brotherhood, including the provisions thereof for the arbitration of disputes as to its interpretation and application; (b) alleged that such refusal constituted a violation of such agreement, of the Railway Labor Act, of Delaware law, and of the merger contract between the two air carriers; and (c) asked the Court for a declaration of the rights of the parties and for injunctive relief against such violations?

2. Did the National Mediation Board have jurisdiction of the subject matter of such Brotherhood's complaint?

STATUTES INVOLVED

The statutory provisions involved are:

1. Sections 1331, 1337, 2201 and 2202 of Title 28 of the United States Code (28 U.S.C.A., Sections 1331, 1337, 2201 and 2202).

2. Section 2, First; Section 2, Seventh; Section 2, Ninth; Section 5, Second; Section 6; and Section 204 of the Railway Labor Act (45 U.S.C.A., Section 152, First; Section 152, Seventh; Section 152, Ninth; Section 755, Second; Section 156; and Section 184).

3. Section 328 of the Delaware General Corporation Law.

These statutory provisions are printed in Appendix A, *infra*, page 40, et seq.

STATEMENT

On May 13, 1947, the National Mediation Board, acting pursuant to Section 2, Ninth of the Railway Labor Act (45 U.S.C.A., Section 152, Ninth), certified the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter called the "Brotherhood") as the designated representative for the purposes of the Railway Labor Act of all employees of Capital Airlines, a common carrier by air, in the craft or class of clerical, office, stores, fleet, and passenger service. Thereafter, the Brotherhood and Capital executed a collective bargaining agreement effective August 1, 1948, covering rates of pay, rules and working conditions of such craft or class of employees. (R. 4.) Such agreement was revised from time to time in accordance with the provisions of the Railway Labor Act. The last revision thereof became effective on August 3, 1959 (R. 13).

The agreement between the Brotherhood and Capital concerned matters typically covered by collective bargaining agreements such as seniority, protection of employees against arbitrary discipline and discharge, rules governing promotion, assignment, and displacement (R. 14-32, 111, 119). The agreement also con-

tained a union security provision requiring the employees to maintain membership in good standing in the Brotherhood and a provision for a check off of dues (R. 37-41).

In accordance with the requirements of Section 204 of the Railway Labor Act (45 U.S.C.A., Section 184), the agreement contained a provision establishing a Board of Adjustment to arbitrate and determine disputes between the carrier and its employees or their representative concerning the interpretation or application of the agreement (R. 32-35).

Article 1(b) of the agreement dealt with the contingency of a future merger involving Capital and read as follows: (R. 24)

> "All provisions of this Agreement shall be binding upon the successors or assigns of the Company and in case of a consolidation or merger, the Company will notify the Brotherhood at least ninety (90) days prior to such consolidation, or merger, and representatives of the Company and the Brotherhood will meet and negotiate for the procedure to be followed and the protection to be afforded the employees involved."

On August 11, 1960, United and Capital entered into a merger agreement providing for the merging of Capital into United, with United as the surviving corporation (R. 5, 108). Section III, paragraph 1 of the merger agreement transferred to United all the rights, privileges, powers and franchises of Capital subject to all the restrictions, disabilities and duties of each of the constituent corporations as well as all of the property, real, personal and mixed of Capital. This section of the merger agreement also imposed upon

United the following obligations with respect to the duties, liabilities, and debts of Capital: (R. 5, 6)

> "United * * * shall be subject to all of the restrictions, disabilities and duties of each of the Constituent Corporations; * * * and all debts, liabilities and duties of each of the Constituent Corporations shall thenceforth attach to United, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it."

Both United and Capital were Delaware corporations (R. 3, 4). At all times material, Section 328 of the Delaware General Corporation Law provided as follows: (App. A, page 44)

> "The liability of corporations * * * existing under the laws of this State * * * or the rights or remedies of the creditors thereof, or of persons doing or transacting business with the corporation, shall not in any way be lessened or impaired by the * * * merger of two or more corporations * * *."

In spite of the provisions of Article 1(b) of the collective bargaining agreement, quoted above, neither Capital nor United served any notice upon the Brotherhood of the proposed merger, and the organization first heard of the proposed merger in newspaper accounts thereof, published August 12, 1960 (R. 6, 108). The Brotherhood promptly, on August 16, 1960, wrote to both carriers calling their attention to the provisions of Article 1(b) of the collective bargaining agreement between Capital and the Brotherhood and asked for a meeting of the parties to arrange for implementation of the agreement upon consummation of the merger as provided in said Article. In these letters, the

Brotherhood also advised the two carriers of its position that United was required to assume the obligations of the agreement (R. 108, 109). Both Capital and United declined this request (R. 7, 108, 109).

United and Capital filed a joint application with the Civil Aeronautics Board for approval of the merger agreement under Section 408 of the Federal Aviation Act of 1958 (49 U.S.C.A., Section 1378). The Brotherhood appeared in the hearings before the Board and requested that, if the Board should approve the proposed merger, it impose as a condition of approval a requirement that United take over the Brotherhood-Capital agreement and apply such agreement to those employees of Capital covered by the agreement who became employees of United (R. 7). United opposed this request on the ground that the agreement automatically terminated upon consummation of the merger. (See Board findings below.)

On November 28, 1960, following the close of the hearings before the Board on the merger application, representatives of Capital finally met with representatives of the Brotherhood. At this meeting the Capital representatives stated that they could not negotiate any arrangements for the assumption by United of the obligations of the Brotherhood-Capital collective bargaining agreement which would be effective upon consummation of the merger or binding on United (R. 7).

On April 3, 1961, the Civil Aeronautics Board approved the merger of the two air carriers. *United-Capital Merger Case,* 33 C.A.B. 307. In its opinion approving the merger, the Board declined to require United to assume the obligations of the collective bargaining agreement between the Brotherhood and Capi-

tal. Its findings on this point read as follows: (pages 330, 331)[1]

> "IAM-BRC request that the Board condition approval of the merger upon acceptance and recognition by United of contracts which Capital now maintains with its employees. This has particular reference to the fact that the employment of clerks is covered by a collective bargaining agreement at Capital but not at United. United's position is that Capital will cease to exist upon the merger, whereupon the Capital employees will become employees of United and subject to the same bargaining agreements, rules, and practices (or lack of same) as United's other employees.
>
> "It would seem that this matter, on which the examiner did not comment, is one of the matters which should appropriately arise under section 11. That is to say, Capital and United should jointly

[1] The Brotherhood also asked the Board to condition any approval it granted for the merger by imposing the standard conditions which the Board had developed for the protection of employees adversely affected by airline mergers. *North Atlantic Route Transfer Case*, 12 C.A.B. 124 (1950); *Braniff-Mid-Continent Merger Case*, 15 C.A.B. 708 (1952); *Delta-C & S Merger Case*, 16 C.A.B. 647 (1952); *Flying Tiger-Slick Merger Case*, 18 C.A.B. 326 (1954); *Continental-Pioneer Acq. Case*, 20 C.A.B. 323 (1955); *Wien Alaska Air. Acq. of Byers*, 23 C.A.B. 428 (1956); *Colonial-Eastern Acq. Case*, 23 C.A.B. 500 (1956); *Mackey-Midet Acq. Case*, 24 C.A.B. 51 (1956). A reference to these Board decisions will show that the conditions thus imposed are basically a modification of the provisions of the Washington Agreement of May 1936, an agreement between railway labor organizations and major railroads to provide employees protection in the case of railroad coordinations. Such request and the conditions involved are unrelated to the dispute between the Brotherhood and United covering the continuity of the Brotherhood-Capital collective bargining agreement although they are set forth in the United affidavits filed in the District Court (R. 59-68). They relate primarily to benefits to be accorded Capital employees who lose their jobs as a result of the merger or are forced to take lower paying jobs.

> and severally give at least 45 days' notice to the employees who will be affected as a result of the merger by a change or loss of representation and collective bargaining agreement. This would then place the matter as a problem to be worked out between the companies and employees, in accordance with regular procedures applicable to the matter of representation and agreement."

On April 15, 1961, such notices were posted by United and Capital setting forth the intention of United not to assume the obligations of the Brotherhood-Capital collective bargaining agreement, but to subject the employees of Capital covered by such agreement to unilateral rules imposed by company regulations upon the consummation of the merger (R. 49, 54-56).

The Brotherhood sought to carry out the Board's finding that it was leaving the matter as a problem to be "worked out between the companies and employees" by meeting with officers of United on May 9, 1961. At that meeting, United advised the Brotherhood that it would not assume any of the obligations of the collective bargaining agreement between Capital and the Brotherhood. Since that date, United has refused to meet with representatives of the Brotherhood to discuss the matter (R. 110).

The Brotherhood interpreted the Board's order as having passed judgment upon the obligations of United to take over and apply the collective bargaining agreement between Capital and the Brotherhood. It therefore filed a petition with the United States Court of Appeals for the District of Columbia Circuit to review and set aside the Board's order approving the merger insofar as it related to employee matters. This petition was identified as *Brotherhood of Railway and*

Steamship Clerks v. *Civil Aeronautics Board* (Case No. 16,360). (R. 49). The Brotherhood also sought a partial stay of the proposed merger, insofar as it might permit United to violate the rights of employees covered by the Brotherhood-Capital agreement (R. 49). In its answer to the Brotherhood's motion for a stay, the Board disclosed that in approving the merger without imposing the condition requested by the Brotherhood relating to United's duty to assume the obligations of the collective bargaining agreement, the Board had not passed upon nor had it intended to pass upon the question of whether such agreement was a lawful obligation of United upon the consummation of the merger. This statement of the Board read as follows: (R. 50)

> "The Board did not accede to the Brotherhood's contention that the Capital acquisition should be 'conditioned' upon the assumption by United of the collective bargaining agreement. Neither did it purport to pass on the issue of whether United would be justified, as a matter of contract or labor law, in ignoring the agreement. In these circumstances, and since Government counsel do not know the effect which issuance of the stay here sought might have upon United's operation of the merged system, we leave the argument to the private parties."

Under the circumstances, the Court denied the stay and the Brotherhood subsequently withdrew the petition (R. 50).[2]

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[2] The Court affirmed the Board's order approving the merger on petitions to review filed by Delta, Eastern, and Northwest. *Northwest Airlines, et al.* v. *Civil Aeronautics Board*, 303 F. 2d 395 (D.C. Cir., 1962).

The merger was consummated on June 1, 1961 (R. 8). Immediately prior thereto, Capital had approximately 6,500 non-management employees of whom approximately 2,700 were covered by the Brotherhood-Capital agreement (R. 48, 50). It operated extensive routes in interstate commerce in the eastern part of the United States. (See map attached to *United-Capital Merger Case,* 33 C.A.B. 307.) United was a much larger airline. Immediately prior to the merger, it had approximately 21,000 non-management employees. Of these, approximately 10,000 belonged to the same craft or class of employees as the Capital employees covered by the Brotherhood-Capital agreement (R. 47, 51). Approximately 7,800 of these had no representation and their rates of pay, rules, and working conditions were covered by company regulations. The remaining 2,200 were in a group designated as ramp and stores employees and were covered by an agreement between United and the International Association of Machinists (hereinafter called the "IAM").[3]

The 2,700 employees of Capital covered by the Brotherhood-Capital agreement became employees of United, which continued the Capital routes and services (R. 8, 51, 52). Of these, United applied its company personnel regulations to some 2,170 employees and refused to accord them the benefits of the Brotherhood-Capital agreement governing their employment (R. 52, 110-112). Affidavits filed by United in the District Court stated that the remaining 530 were ramp and stores employees and that by a letter agreement of June 23, 1961, between United and the IAM, these employees were integrated into that group (R. 51, 93-98).

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[3] R. 51, 69-90.

Section 5, Second of the Railway Labor Act (45 U.S.C.A., Section 155, Second) provides that in any case in which a controversy arises over the meaning or application of an agreement reached through mediation, either party may apply to the National Mediation Board for an interpretation of the meaning or application thereof. The Brotherhood-Capital agreement was such an agreement (R. 5). Therefore, on May 29, 1961, the Brotherhood filed an application with the National Mediation Board pursuant to Section 5, Second of the Railway Labor Act for an interpretation of the meaning or application of the Brotherhood-Capital agreement (R. 7, 8, 41). After a hearing at which United appeared and opposed the Brotherhood's application (R. 8), the National Mediation Board, on August 25, 1961, granted the application and issued an opinion interpreting Article 1(b) of the agreement (R. 41-45). This opinion held that the provisions of Article 1(b) were unambiguous and clearly meant precisely what it said. The Mediation Board's conclusion on the point read as follows: (R. 44)

> "After reviewing the record of mediation in NMB Case No. A-6037, as well as the transcript of hearings and briefs submitted by the Brotherhood and United Air Lines, Inc., this Board is of the opinion that the language of Article 1(b) of the agreement of August 3, 1959, reading 'all provisions of this agreement shall be binding upon the successors and assigns of the company' is clear and unambiguous. In other words, the language means just what it says and we so find."

At the same time, the Mediation Board found that it did not have jurisdiction to spell out the rights and obligations of the parties after the merger of Capital

and United. The conclusions of the Mediation Board upon this point read as follows: (R. 44)

> "It must be pointed out, however, that the mediation agreement was executed on August 3, 1959, while the merger agreement between Capital and United was executed on August 11, 1960. Section 5, Second of the Railway Labor Act, in our view, delegates no authority to this Board to interpret or construe the merger agreement, which is a document foreign to its processes. *The legal authorities cited by the Brotherhood may sustain its position, but this Board lacks jurisdiction to do anything more by interpretation than to construe the instrument produced through its mediatory function.* It is true that the language relied upon looks to the future, but can it be said that the quoted provision clothes this Board with authority to pass upon issues which arise out of subsequent developments such as mergers or consolidations? We think not. In sum, we find that the language is clear and unambiguous, but fail to find authority to spell out the rights and obligations of the parties in the situation presented here." (Emphasis supplied.)

Following the issuance of the Mediation Board's opinion, the Brotherhood made another effort to settle the dispute by negotiation with United upon the basis of the Mediation Board's decision. United refused to meet with the Brotherhood to discuss the matter (R. 8).

Finally, the Brotherhood sought to obtain a determination of the rights of the employees involved through the processing of grievances pursuant to the provisions of Article 43 of the agreement, which provides for a Board of Adjustment to render final and binding determinations on the application and interpretation of the agreement (R. 10, '32). However,

United refused to accept and process these grievances, thus frustrating the Board of Adjustment arbitration process (R. 10).

The Brotherhood, therefore, on November 9, 1961, filed its complaint in the United States District Court for the Southern District of Ohio, Western Division at Cincinnati, for declaratory and injunctive relief (R. 3-11). The headquarters of the Brotherhood are in such judicial district (R. 3) and United engages in air transportation within the District (R. 3, 4).

This complaint alleged the existence of the Brotherhood-Capital agreement and its pertinent provisions; the history of the dispute between the Brotherhood and United with regard to the status of the agreement as a result of the United-Capital merger; United's refusal to assume any of the obligations of the agreement; and further alleged that United's actions violated (a) the terms of the agreement, (b) the provisions of Section 2, First; Section 2, Seventh; Section 6 and Section 204 of the Railway Labor Act, (c) the provisions of applicable Delaware statutes, and (d) the terms of the merger contract between the two air carriers.

The complaint asked for the following declaratory and injunctive relief: (R. 11)

> "(1) That the Court declare the legal rights of the parties with respect to the actual controversy hereinabove described, and their legal relations with respect to the agreement of August 3, 1959;
>
> "(2) That the Court declare that United is a successor or assign of Capital within the meaning of the provisions of Article 1, paragraph (b) of the collective bargaining agreement of August 3,

1959, between the Brotherhood and Capital making the provisions of said agreement binding upon the successors or assigns of Capital;

"(3) That the Court declare that United assumed the liabilities and duties of the collective bargaining agreement of August 3, 1959, between the Brotherhood and Capital by reason of the provisions of Section III, paragraph 1 of the merger agreement of August 11, 1960, between Capital and United;

"(4) That the Court declare that by operation of the laws of the State of Delaware, United is bound by the provisions of the collective bargaining agreement of August 3, 1959, between the Brotherhood and Capital;

"(5) That the Court issue an injunction enjoining United from continuing its refusal to apply the provisions of the collective bargaining agreement of August 3, 1959, between the Brotherhood and Capital to employees of Capital covered by that agreement who became employees of United upon the consummation of the merger;

"(6) That the Court assess the costs of this action against the defendant and grant to the plaintiff all other legal and equitable relief to which it may be entitled."

On December 26, 1961, United filed a motion with the District Court asking for dismissal of the complaint or for summary judgment on the following grounds: (R. 45, 46)

"1. The Court is without jurisdiction of this cause since it relates to a dispute as to who are the representatives under the Railway Labor Act certain of the employees of United Air Lines, Inc. Exclusive jurisdiction to determine such a dispute vests with the National Mediation Board under the provisions of Section 2, Ninth, of the

Railway Labor Act (45 U.S.C. Section 152, Ninth).

"2. If the relief requested by plaintiff were granted, United would be required to treat with a bargaining representative for a minority of a craft or class of employees, contrary to the provisions of the Railway Labor Act under which a carrier may be compelled to deal only with the representative designated by a majority of the craft or class.

"3. It is apparent from the fact of the Agreement between plaintiff and Capital Airlines, Inc. (Exhibit A to the Complaint), which Agreement plaintiff asks the Court to declare is binding upon United, that the Agreement was not intended to be and can not be—either legally or practically—applied to less than the entire craft or class of employees covered under its provisions.

"4. The International Association of Machinists now represents approximately 530 employees for whom the plaintiff here seeks representation rights. The relief requested herein cannot be granted without adversely affecting the rights of that labor organization under the Railway Labor Act and under its agreement with United. Hence, if the Court concludes it had jurisdiction of this cause, then the International Association of Machinists is an indispensable party to this action, but has not been named as a party by the plaintiff."

The Brotherhood filed a cross-motion for summary judgment (R. 105, 106).

The IAM, through its General Counsel, advised the Brotherhood that there was no dispute between the two organizations with respect to the representation of employees on the property of United and that accordingly the IAM had no interest in the litigation

between the Brotherhood and United (R. 122). This advice was submitted to the District Court by way of affidavit in support of the Brotherhood motion (R. 114, 116, 122, 123).

On August 9, 1962, the District Court granted United's motion to dismiss the complaint upon the ground that the Court was without jurisdiction of the cause since it relates to a dispute as to who are the representatives under the Railway Labor Act of certain employees of United and that the Mediation Board has exclusive jurisdiction over such disputes under Section 2, Ninth of the Railway Labor Act (R. 127-129).

The cross-motions of the Brotherhood and United for summary judgment were also denied for lack of jurisdiction (R. 129).

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court upon the same grounds (R. 131-138).

While the appeal from the District Court's decision was pending before the Sixth Circuit, the Brotherhood, on August 24, 1962, filed an application with the National Mediation Board for certification under Section 2, Ninth of the Railway Labor Act as representative of the entire craft or class of employees of United, of which the employees of Capital covered by the collective bargaining agreement between the Brotherhood and Capital were a part. (See page 10, *supra*.) This application has not been processed because United and a group of its employees calling themselves the Association for the Benefit of Non-Contract Employees brought separate suits in the United States District Court for the District of Columbia to enjoin the Media-

tion Board from holding a representation election on the application unless (a) the Board first conducted a hearing for the purpose of re-examining the composition of the craft or class of United employees among whom such election should be held, and (b) the ballot used in the election contained a place for employees, to affirmatively vote "no union". These requests had been submitted to and denied by the Board. The Brotherhood intervened in the suit brought by the employee group as a party defendant.

The District Court dismissed United's complaint. A different judge of the District Court granted the injunction requested by the employee group. On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed these judgments. *United Air Lines, Inc.* v. *National Mediation Board, et al.; National Mediation Board, et al.* v. *Association for the Benefit of Non-Contract Employees;* and *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees,* 330 F.2d 853 (1964). On June 1, 1964, both the Brotherhood and United filed petitions with this Court for writs of certiorari to review such judgments. (Cases Nos. 1170 and 1171—October Term, 1963.)

SUMMARY OF ARGUMENT

I

Implicit in the position of United throughout that carrier's dispute with the Brotherhood concerning the carrier's obligations with respect to the Brotherhood-Capital collective bargaining agreement has been the contention that such agreement terminated upon consummation of the merger of Capital into United. This Court's decision in *John Wiley & Sons, Inc.* v. *Living-*

ston, 376 U.S. 543 (1964), disposes of this argument contrary to the position of United. In both cases the surviving corporation continued the operations of the merged corporation and utilized the employees covered by the collective bargaining agreement. The Brotherhood-Capital agreement, like the agreement in *Wiley & Sons,* contains a provision to arbitrate. In addition, the Brotherhood-Capital agreement, unlike the agreement in *Wiley & Sons,* contains a provision that the agreement shall be binding on successors or assigns of Capital. There is thus an even stronger case for the continuing vitality of the Brotherhood-Capital agreement.

The Brotherhood-Capital agreement was executed pursuant to the Railway Labor Act, whereas the *Wiley & Sons* agreement was subject to the National Labor Relations Act. However, this difference does not affect the continuation of the agreement following the merger. The same considerations of national labor policy which supported the decision in *Wiley & Sons* are applicable to agreements subject to the Railway Labor Act. Moreover, Section 2, First of that statute places a duty upon both carriers and employees to maintain collective bargaining agreements. The continuation of the obligations of the Brotherhood-Capital agreement upon consummation of the United-Capital merger is also consistent with practice in both the railroad and air transport industries under the Railway Labor Act.

II

The District Court had jurisdiction of the subject matter of the Brotherhood complaint seeking a declaratory judgment with respect to the status of the Brotherhood-Capital agreement after consummation of the United-Capital merger and injunctive relief

against United's continued refusal to recognize its obligations under that agreement. The complaint alleged that United's action violated Sections 2, First, 2, Seventh, 6, and 204 of the Railway Labor Act, as well as the requirements of Delaware law under which the merger contract was executed, the provisions of the merger contract, and the provisions of the Brotherhood-Capital agreement. There was thus clearly presented issues over which the District Court had jurisdiction under Title 28 of the United States Code, Sections 1331 and 1337.

The fact that the Brotherhood complaint raised Federal issues was not contested by United nor was the complaint dismissed by the District Court on that ground. Rather, both the District Court and the Court of Appeals concluded that the complaint gave rise to a representation dispute subject to the exclusive jurisdiction of the National Mediation Board pursuant to Section 2, Ninth of the Railway Labor Act. Neither of the Courts below made clear the nature of this dispute or the parties thereto. However, United contended to both Courts that the Brotherhood complaint gave rise to a representation dispute between the Brotherhood and the IAM with respect to a group of approximately 530 ramp and stores employees out of 2700 employees covered by the Brotherhood-Capital agreement because the ramp and stores employees were represented on United by the IAM and such employees had been integrated into the IAM representation subsequent to the merger.

It is submitted that the situation to which United adverts does not convert the Brotherhood complaint into a suit to adjudicate a representation dispute nor serve to defeat enforcement of the Brotherhood-Capital agreement against United. There is admittedly

no representation dispute as to the approximately 2,170 employees covered by the Brotherhood-Capital agreement who have been unrepresented on United. Their rights under the agreement cannot be defeated by reason of the status of the much smaller group of ramp and stores employees. Moreover, a decision pursuant to the Brotherhood complaint to the effect that United was required to assume the obligations of the Brotherhood-Capital agreement upon consummation of the merger on June 1, 1961, would not create any dispute between the Brotherhood and the IAM with respect to representation of the other 530 ramp and stores employees. Such a decision would only establish that on the date of the consummation of the merger United was required to assume the obligations of the Brotherhood-Capital agreement until terminated in accordance with the provisions of the Railway Labor Act. United asserts that it made a new agreement covering the 530 ramp and stores employees with the IAM on June 23, 1961. The Brotherhood complaint does not seek to adjudicate the validity of that agreement. The IAM has recognized that the Brotherhood complaint does not give rise to any representation dispute between the two organizations and has stated that it has no interest in the litigation.

United has also contended that the Brotherhood-Capital agreement cannot be enforced because the Brotherhood cannot represent a minority of the craft or class on the property of the carrier. This contention is determined contrary to the United position by the decision in *Wiley & Sons.*

The Court of Appeals in its decision also referred to the impracticality of enforcing the Brotherhood-Capital agreement as to a minority of the craft or class

on United. This reason for denying the continued vitality of the agreement was also rejected by this Court in *Wiley & Sons*. Moreover, the agreement itself provides for conferences between the Brotherhood and the successor company to Capital to provide for its implementation of the agreement on the property of such successor. This procedure has proved practicable in the integration of employees following railroad mergers.

Reference to Section 2, Ninth of the Railway Labor Act shows that it concerns itself solely with disputes between employees of a carrier as to who is their representative. The controversy between the Brotherhood and United is not such a dispute. This conclusion has been confirmed by the decision of the National Mediation Board when the Brotherhood applied for an interpretation of the meaning and application of the Brotherhood-Capital agreement. The Board held that it had no jurisdiction to determine the status of the agreement following the United-Capital merger. Thus, the decision below holds that the Mediation Board has jurisdiction over the subject matter of a dispute which that Board has already declined to determine.

ARGUMENT

I

THE MERGER OF CAPITAL INTO UNITED DID NOT TERMINATE THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE BROTHERHOOD AND CAPITAL.

Implicit in the position of United from the beginning of its dispute with the Brotherhood under the collective bargaining agreement between the Brotherhood and Capital has been the contention that the obligations of such agreement terminated upon the consummation of the merger of Capital into United.

This contention stands rejected by this Court's decision in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 11 L.ed.2d 898 (1964). In that case, as here, one surviving corporation in a merger of two corporate enterprises refused to accept and recognize the obligations of a collective bargaining agreement between a union and the merged corporation. The surviving corporation asserted that the merger terminated the collective bargaining agreement for all purposes. This Court rejected that contention in the following finding: (11 L.ed.2d at 904)

> "We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement * * *."

This Court then went on to state the principles governing this holding as follows: (11 L.ed.2d at 904, 905)

> "While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. '... [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate .... The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant'."[4]

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[4] In footnote 3 (page 904) this Court pointed out by way of comparison the general rule that in the case of a merger the corporation which survives is liable for the debts and contracts of the one which disappears. This is also the requirement of Delaware General Corporation Law which governed the merger of United and Capital (R. 6). The merger agreement of the two carriers also provided that United should assume the debts and liabilities of Capital (R. 5).

This Court also pointed out that such a rule was necessary to the protection of the interest of employees and the objectives of the national labor policy. It's conclusions on this point read as follows: (11 L. ed. 2d 904)

> "Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.".

On June 10, 1964, the United States Court of Appeals for the Ninth Circuit, citing the *Wiley & Sons* decision as controlling authority, held that a corporation which had purchased and continued to operate the business of another corporation was required to honor a collective bargaining agreement entered into by the predecessor corporation: *Wackenhut Corporation* v. *International Union, United Plant Guards of America*, 56 LRRM 2466.[5] In its original decision in this case, dated February 19, 1964 (55 LRRM 2554), the Ninth Circuit had held that the successor corporation was not bound by the collective bargaining agreement under the circumstances which did not involve a merger of

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[5] The decision is not yet officially reported. The reference is to pages of the Labor Relations Reference Manual.

the two corporations. It's holding on this point read as follows: (55 LRRM at 2558)

> "The general rule is that where one company sells or otherwise transfers all of its assets to another company, the purchaser is not, absent its express consent, liable for the debts and liabilities of the seller. The rule is otherwise, however, where: (1) the transaction amounts to a consolidation or merger; (2) the purchasing company is merely a continuation of the selling company; or (3) the transaction is entered into fraudulently in order to escape liability for such obligations. 15 Fletcher, Private Corporations, (perm. ed. 1961 rev. vol.) § 7122, p. 187.
>
> "Applying this rule in the field of labor relations, it has heretofore been held, in effect, that where none of the indicated exceptions are applicable, that a purchasing corporation is not bound by a collective bargaining agreement entered into by the selling corporation."

It should be observed that the Ninth Circuit held, even before the *Wiley & Sons* decision, that where the transaction constitutes a merger as in the case of United and Capital that the successor corporation is bound by the agreement with the non-surviving corporation.

On rehearing, the Ninth Circuit spoke as follows with respect to the effect of the *Wiley & Sons* decision on the case: (56 LRRM 2469)

> "In our opinion the judgment for the unions is not sustainable on the ground, relied upon by the trial court, that subsequent to the sale by General Plant to Wackenhut, the latter agreed to fulfill the obligations of the General Plant collective bargaining agreement. No purpose will be served by stating our reasons for reaching this conclusion

because we hold that the judgment is in any event sustainable on another ground urged at the trial and renewed here. That ground is that under the circumstances of this case, and apart from the exchange of telegrams and the telephone conversations referred to above, the policy of the national labor laws obligates Wackenhut, as the successor employer, to honor the collective bargaining agreement entered into by its predecessor, General Plant.

"This conclusion, we believe, is required by the recent decision of the Supreme Court in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 55 LRRM 2769, rendered after the appeal was taken in the case before us. In that case it appeared that Interscience Publishers, Inc., after entering into a collective bargaining agreement, which included an arbitration provision, merged with John Wiley & Sons, Inc., and ceased to do business as a separate entity. There was then a wholesale transfer of employees from Interscience to Wiley which engaged in the same business. The Supreme Court held that Wiley, as the successor employer, is bound by the preexisting labor agreement and is obligated to arbitrate grievances presented by the union which is a party to that agreement.

"There are statements in the opinion of the Supreme Court in Wiley which, considered separately, might appear to indicate that the fact that the change of employers had been accomplished by a merger, rather than by a sale and purchase of assets as in our case, was a controlling factor in reaching the result indicated. Reading the opinion as a whole, however, we are convinced that the Supreme Court did not rest the decision in Wiley on that narrow ground, but upon a broader view dictated by the policy of the national labor laws.

"What the Supreme Court did in Wiley was to balance the rightful prerogative of owners inde-

pendently to rearrange their businesses and even eliminate themselves as employers against the necessity of affording some protection to the employees covered by a collective bargaining agreement containing an arbitration clause, from a sudden change in the employment relationship. Having in view the objectives of national labor policy reflected in established principles of federal law, the court held the described interest of the employees outweighs that of the employer, and must prevail.

"The specific rule which we derive from Wiley is that where there is substantial similarity of operation and continuity of identity of the business enterprise before and after a change in ownership, a collective bargaining agreement containing an arbitration provision, entered into by the predecessor employer is binding upon the successor employer."

The basic circumstances of the present case are almost identical to those involved in the *Wiley & Sons* case. There was in each case a collective bargaining agreement between a union and a company which subsequently merged itself into another company; the business and operations of the non-surviving corporation were continued by the surviving corporation; the surviving corporation was the larger of the two companies; the employees involved became employees of the surviving corporation; and finally, the collective bargaining agreement contained provisions for the arbitration of disputes concerning its interpretation and application.

There are three differences in the circumstances surrounding the *Wiley & Sons* case and the circumstances surrounding the present case. These are:

First: The agreement in *Wiley & Son* did not contain a provision that the agreement should be binding upon a successor corporation. The Brotherhood-Capital agreement did contain such a provision, including a provision for the parties to meet and agree upon the procedures for implementing the application of the agreement upon consummation of the merger (R. 24). The Brotherhood promptly insisted to both carriers that this obligation be met (R. 7, 108, 109). The existence of this provision strengthens the Brotherhood case for a continuance of the agreement upon the merger, in contrast to the agreement in the *Wiley & Sons* case which did not contain a successor provision.

Second: The Brotherhood-Capital agreement was executed pursuant to the provisions of the Railway Labor Act, whereas the *Wiley & Sons* agreement was subject to the provisions of the National Labor Relations Act. This difference does not affect the continuity of the agreement because the statement of national labor policy by this Court as a basis of its decision in the *Wiley & Sons* case is equally applicable to agreements executed under the Railway Labor Act. Indeed, Section 2, First of the Railway Labor Act (45 U.S.C.A. Section 152, First) imposes a duty upon carriers and employees to make and maintain collective bargaining agreements. Moreover, the continuing vitality of collective bargaining agreements in cases of mergers has been consistently recognized in the railroad and airline industries subject to the Railway Labor Act. *Norfolk & Western Railway Company-Virginian Railway Company—Merger*, 307 I.C.C. 401; *City of Nashville, Tennessee* v. *United States*, 155 F. Supp. 98, 105 (U.S. D.C.-M. D. Tenn., Nashville Div., 1957), aff'd Per Curiam 355 U.S. 63; *Colonial-Eastern Merger*, 23 C.A.B. 500 (R. 115-118); *Alaska Coastal Airlines, Inc.-Ellis Airlines Merger Case* (R. 119-121).

Third: In the *Wiley & Sons* case no union represented any of the employees on the property of the surviving corporation. In the present case, the affidavits of United show that 530 of the approximately 2,700 employees covered by the Brotherhood-Capital agreement belonged to a group of ramp and stores employees represented on the property of United by the IAM (R. 51, 69-90) and, as also shown by such affidavits, were brought under such agreement after the consummation of the merger (R. 51, 91-98). For the reasons set forth below at pages 30-39, it is the Brotherhood position that this difference is of no significance in the enforcement of the obligations of the Brotherhood-Capital agreement against United.

II

THE DISTRICT COURT HAD JURISDICTION OVER THE COMPLAINT OF THE BROTHERHOOD TO REQUIRE UNITED TO ASSUME THE OBLIGATIONS OF THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE BROTHERHOOD AND CAPITAL

The complaint of the Brotherhood in the present case asked for a judicial declaration as to the rights of the parties and their legal relations with respect to the Brotherhood-Capital agreement and for necessary injunctive relief (R. 11). It is submitted that the District Court had jurisdiction to grant this relief.

A. A suit to enforce a collective bargaining agreement executed pursuant to the Railway Labor Act is governed by Federal law.

Paragraph 2 of the Brotherhood complaint in the District Court set forth the jurisdiction of the court over the subject matter as follows: (R. 3)

> "The jurisdiction of this Court derives from the Act of June 25, 1948 (28 U.S.C.A. Sections 1331 and 1337), and from said Act as amended by the Acts of July 26, 1956, and July 25, 1958 (28 U.S.C.A. Section 1332). The matter in con-

troversy exceeds the sum or value of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, and involves the Railway Labor Act (45 U.S.C.A. Sections 151 et seq.). As hereinafter more fully described, full diversity of citizenship exists between plaintiff and defendant."

Paragraphs 22 through 25 of the complaint (R. 9, 10) alleged that United's refusal to assume the obligations of the Brotherhood-Capital collective bargaining agreement constituted a violation of the provisions of Section 2, First; Section 2, Seventh; Section 6 and Section 204 of the Railway Labor Act. These allegations clearly brought the complaint within the requirements of Title 28, Section 1331 of the United States Code, which confers jurisdiction in the District Court over all civil actions arising under the Constitution and the laws and treaties of the United States where the matter in controversy exceeds a stated amount.[6] These allegations were also sufficient to bring the complaint within the requirements of Title 28, Section 1337 of the United States Code, which confers jurisdiction in the District Court with respect to any civil action arising under any act of Congress regulating commerce. In addition, the decision in *Wiley & Sons* as well as this Court's decision in *International Association of Machinists* v. *Central Air Lines*, 372 U.S. 682 (1963), attest to the fact that the collective bargaining agreement here involved is governed by Federal law and that a suit to enforce such agreement may properly be brought in a Federal court.

The *Central Air Lines* case involved a decision to enforce an arbitration award rendered by an Adjustment Board created by agreement pursuant to Section

[6] The jurisdictional amount of $10,000 exclusive of interest and costs is alleged in Paragraph 2 of the complaint, quoted above.

204 of the Railway Labor Act (45 U.S.C.A., Section 184). This Court stated as follows with reference to the application of Federal law to collective bargaining agreements: (page 693)

> "'* * * A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it * * *' Railway Employes' Dept. A.F. of L. v. Hanson, 351 US 225, 232, 100 L ed 1112, 1130, 1131, 76 S Ct 714. That is, the § 204 contract, like the Labor Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts."

Again, in *Wiley & Sons*, this Court stated as follows with respect to the controlling nature of Federal law in a suit to enforce a collective bargaining agreement: (page 904)

> "Federal law, fashioned 'from the policy of our national labor laws,' controls. Textile Workers Union v. Lincoln Mills, 353 US 448, 456, 1 L ed 2d 972, 980, 77 S Ct 912. State law may be utilized so far as it is of aid in the development of correct principles or their application in a particular case, id., 353 US at 457, 1 L ed 2d at 981, but the law which ultimately results is federal."

It is, therefore, clear that the District Court had jurisdiction of a complaint of the type here involved.

B. The Brotherhood complaint did not give rise to a representation dispute over which the National Mediation Board has exclusive jurisdiction under Section 2, Ninth of the Railway Labor Act.

In spite of the fact that the Brotherhood-Capital agreement was clearly governed by Federal law, the District Court held that it was without jurisdiction of the subject matter of the Brotherhood complaint since it related to a dispute as to who are the representatives

under the Railway Labor Act of certain of the employees of United, and exclusive jurisdiction of such a dispute is conferred upon the National Mediation Board by Section 2, Ninth of the Railway Labor Act. (R. 127.) The decision of the Court of Appeals affirmed this conclusion (R. 131-138).

There has been no disagreement between the Brotherhood and United over the proposition that a dispute among the air carrier's employees as to who are the representatives of such employees is vested within the exclusive jurisdiction of the National Mediation Board by the provisions of Section 2, Ninth of the Railway Labor Act. However, the Brotherhood submits that the complaint in this case does not seek the adjudication of such a dispute.

Section 2, Ninth of the Railway Labor Act reads as follows:

> "Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate

> method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

The complaint of the Brotherhood in the District Court (R. 3-11) clearly does not by its terms seek adjudication of any dispute between the Brotherhood and any other organization with respect to the representation of any employees of United. The decision of the Court of Appeals recognizes this to be true but finds that "looking through form to substance" it, in fact, does involve a representation dispute (R. 136).

Neither the decision of the District Court nor that of the Court of Appeals makes clear the precise nature of the representation dispute which these Courts found the complaint in substance sought to adjudicate. However, in its brief in opposition to the petition for certiorari in this Court, United contends that there are three disputes involved which are representation disputes over which the National Mediation Board has exclusive jurisdiction. These are (1) conflicting claims by two unions respecting jurisdiction over many of the employees covered by the Brotherhood-Capital

agreement; (2) a dispute as to the representative status of the Brotherhood for a minority of the craft or class; and (3) a dispute as to the composition of the craft or class. However, an examination of these arguments show that they are wholly without merit.

First: It is argued that if United is bound to assume the obligations of the Brotherhood-Capital agreement a representation dispute will arise as to proper representation of 530 of the former Capital employees covered by that agreement belonging to the group of ramp and stores employees who are represented on United by the IAM. Even if this argument has validity as to the 530 ramp and stores employees, it has no validity as to the remaining 2,170 employees of United covered by the Brotherhood-Capital collective bargaining agreement who are admittedly not represented on the property of United (R. 51, 110-112). These employees are in the identical position as the employees who were merged into the surviving corporation in the *Wiley & Sons* case. A declaratory judgment on the rights of parties under the agreement could easily give recognition to the differing status of the 2,170 employees covered by the Brotherhood-Capital agreement as against the 530. It would clearly be a violation of their rights to deprive the 2,170 employees of the benefits of the Brotherhood-Capital agreement because of a claimed dispute as to representation rights with respect to another much smaller group of employees covered by that agreement. If the argument of United were carried to its logical conclusion, it would prevent the 2,170 employees from receiving their contract rights if only 1 employee belonged to another group represented by another union.

Moreover, the alleged dispute between the Brotherhood and IAM over representation of the 530 em-

ployees is a controversy which United has created in order to defeat the rights of all the employees involved. A decision by the District Court requiring United to assume the obligations of the Brotherhood-Capital collective bargaining agreement would not decide any representation rights between the Brotherhood and the IAM as to the 530 ramp and stores employees. The rights of these 530 employees under the Brotherhood-Capital agreement do not depend upon the identity of their representative. If United was required by law to assume the obligations of this agreement, then that agreement became effective as to those employees on June 1, 1961, the date of the consummation of the merger, regardless of the identity of their representative, until terminated or revised in accordance with the Railway Labor Act. United's affidavits filed with the District Court stated that such termination as to the 530 ramp and stores employees took place on June 23, 1961 (R. 51, 91-98). If the factual allegations of United are correct, a decision to the effect that United was required to assume the obligations of the Brotherhood-Capital agreement upon consummation of the merger on June 1, 1961, would simply mean that between June 1 and June 23, 1961, the 530 ramp and stores employees were entitled to the benefits of that agreement regardless of who was their representative. The Brotherhood complaint does not ask the District Court to determine the validity of the agreement between United and the IAM or to decide that the Brotherhood has any representation rights as to the 530 employees involved.

The IAM recognized that the Brotherhood complaint did not give rise to any representation dispute between that organization and the Brotherhood concerning any of United's employees. Its General Counsel examined

the complaint and advised the Brotherhood that no such dispute existed and that the IAM had no interest in the litigation (R. 122).

Second: It is suggested that the Brotherhood complaint gives rise to representation questions under the exclusive jurisdiction of the National Mediation Board because in effect it seeks representation rights for a minority of a craft or class. The decision of this Court in the *Wiley & Sons* case eliminates this contention from the picture. This Court spoke as follows on the question of continued representative status of a certified union following a change of ownership: (page 905)

> "In addition, we do not suggest any view on the questions surrounding a certified union's claim to continue representative status following a change in ownership. See, e.g., Labor Board v Aluminum Tubular Corp. 299 F2d 595, 598-600; Labor Board v McFarland, 306 F2d 219; Cruse Motors, Inc. 105 NLRB 242, 247. This Union does not assert that it has any bargaining rights independent of the Interscience agreement; it seeks to arbitrate claims based on that agreement, now expired, not to negotiate a new agreement."

The Brotherhood is in the same position. It does not assert that it has any bargaining rights independent of the Brotherhood-Capital agreement. It seeks to establish rights under that agreement, not to negotiate a new agreement.

Moreover, this Court went on to specifically find that the fact that the union in the *Wiley & Sons* case did not represent a majority of the bargaining unit of the surviving corporation did not prevent it from representing the employees covered by the agreement in

dispute. This Court's findings on this point read as follows: (page 905, footnote 5)

> "The fact that the Union does not represent a majority of an appropriate bargaining unit in Wiley does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises. Retail Clerks Int'l Assn., Local Unions Nos. 128 & 633, v Lion Dry Goods, Inc., 369 US 17, 7 L ed 2d 503, 82 S Ct 541. There is no problem of conflict with another union, cf. L. B. Spear & Co., 106 NLRB 687, since Wiley had no contract with any union covering the unit of employees which received the former Interscience employees."

The Court of Appeals in its decision here under review referred to the "impracticable result" which would follow from applying the collective bargaining agreement between the Brotherhood and Capital to a minority craft or class of United's employees" (R. 136). In the *Wiley & Sons* case, this Court considered such a problem and rejected it as a basis for refusing to enforce the collective bargaining agreement involved following a merger. This Court's finding on this point read as follows: (page 906, footnote 5 continued)

> "Problems might be created by an arbitral award which required Wiley to give special treatment to the former Interscience employees because of rights found to have accrued to them under the Interscience contract. But the mere possibility of such problems cannot cut off the Union's right to press the employees' claims in arbitration. While it would be premature at this stage to speculate on how to avoid such hypothetical problems, we have little doubt that within the flexible procedures of arbitration a solution can be reached

which would avoid disturbing labor relations in the Wiley plant."

The Brotherhood and Capital anticipated this problem in the drafting of Article 1(b) of their agreement, quoted at page 4 above, which makes the agreement binding upon successors and assigns of Capital in case of a merger by providing that if there were a merger the parties would meet and negotiate the procedure to be followed and the protection to be afforded the employees involved. Furthermore, if the parties were unable to meet such problems under Article 1(b), the problems could be determined by arbitration before an Adjustment Board under Article 4? of the agreement (R. 24, 32).

This statement clearly means that United could have no objection to representation rights for the Brotherhood based on the Brotherhood-Capital agreement of the approximately 2,170 employees covered by such agreement who are admittedly not represented by any union on the property of United. As to the other 530 employees, the Brotherhood recognizes that it cannot seek representation rights based on that agreement if they are represented by another union and it does not in its complaint ask for such rights. The discussion above, pages 33-35, showing that there is no dispute between the Brotherhood and the IAM concerning the representation of these 530 employees makes this fact clear.

United has defeated the machinery thus provided to settle any controversies arising out of the implementation of the Brotherhood-Capital agreement following the merger by refusing to recognize any obligations under the agreement and by refusing to meet with the Brotherhood for such purpose (R. 7, 108, 109, 110).

Third: It is suggested by United that the Brotherhood complaint gives rise to a dispute as to the composition of the craft or class involved. The Brotherhood does not perceive how a decision that United was required to assume the obligations of the Brotherhood-Capital agreement upon the consummation of the merger gives rise to any dispute as to the composition of the craft or class involved. This craft or class was established by the National Mediation Board and the Brotherhood and United are in agreement that all of the approximately 2,700 employees fall within the craft or class so established. The fact that 530 of the total craft or class fall within the ramp and stores group now covered by an IAM-United agreement does not give rise to a dispute as to the composition of the craft or class any more than it gives rise to a representation dispute.

The fact that the National Mediation Board does not have jurisdiction to adjudicate the Brotherhood complaint is also made clear by a reference to the provisions of Section 2, Ninth of the Railway Labor Act and the decision of the National Mediation Board upon the Brotherhood's application for an interpretation of the meaning or application of the Brotherhood-Capital agreement. Section 2, Ninth concerns only disputes "among a carrier's employees as to who are the representatives of such employees." The only dispute here is a dispute, not among employees, but between United and the Brotherhood. Moreover, when the Brotherhood applied to the National Mediation Board under Section 5, Second of the Railway Labor Act for the interpretation of the meaning or application of the Brotherhood-Capital collective bargaining agreement that Board specifically held that "this Board lacks jurisdiction to do anything more by interpretation

than to construe the instrument produced through its mediatory function" (R. 44). The Mediation Board further held that it had no authority "to spell out the rights and obligations of the parties in the situation presented here", i.e., the consummation of the merger between Capital and United (R. 44).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

Judicial Code

Sections 1331, 1337, 2201 and 2202 of Title 28 of the United States Code (28 U.S.C.A., Sections 1331, 1337, 2201 and 2202):

Section 1331:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

* * * * *

Section 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

* * * * *

Section 2201:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

* * * * *

Section 2202:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse

party whose rights have been determined by such judgment."

Railway Labor Act

Sections 2, First; 2, Seventh; 2, Ninth; 5, Second; Section 6 and Section 204 of the Railway Labor Act (45 U.S.C.A., Sections 152, First; 152, Seventh; 152, Ninth; 155, Second; 156 and 184):

Section 2, First:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

* * * * *

Section 2, Seventh:

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

* * * * *

Section 2, Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent

the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

* * * * *

Section 5, Second:

"Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days."

* * * * *

Section 6:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

* * * * *

Section 204:

"The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

"It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

"Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151-163 and 181-188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181-188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction."

Delaware Statute

Section 328 of the Delaware General Corporation Law (8 Del. C., Section 328):

"§ 328. Liability of corporation, etc., impairment by certain transactions.

"The liability of corporations created under this chapter, or existing under the laws of this State or the stockholders, directors or officers thereof, or the rights or remedies of the creditors thereof, or of persons doing or transacting business with the corporation, shall not in any way be lessened or impaired by the sale thereof, or by the increase or decrease in the capital stock of any such corporation, or by the consolidation or merger of two or more corporations or by any change or amendment in the certificate of incorporation."